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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ~~979~~ 29

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

W. H. STRICKLAND,
HARRY F. GILLIS,
Counsel for Petitioners.

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vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

Summary.

Your petitioners, O. B. Williams and Lillie Shaver Hendrix, (the names under which your petitioners were indicted) petition this Honorable Court for a writ of certiorari to issue to the Supreme Court of North Carolina, and would respectfully show:

That your petitioners were indicted in the Superior Court of Caldwell County, North Carolina, under a bill of indictment as appears in the record (R. 1), charging the crime of bigamous cohabitation; that your petitioners were citizens and residents of the State of Nevada and had been so adjudged by a decree of a court of competent jurisdiction

in said State of Nevada (R. 17, 34); that upon an adjudication that the *bona fide* residence of your petitioners was in the State of Nevada your petitioners procured a judgment of absolute divorce from their respective spouses (R. 16, 34) in a court of competent jurisdiction in the State of Nevada, your petitioner, O. B. Williams procuring service under and by virtue of a statute in the State of Nevada providing for service of process in a foreign State in actions, *in rem* or *quasi in rem* by the sheriff of the County and State of the residence of the defendant; the former spouse of Lillie Shaver Hendrix having signed a card (R. 9) agreeing to accept service of the process when the same was forwarded to him and having fled to the State of Ohio, actual service was had upon him by publication. Upon the rendition of a decree of absolute divorce, which decree restored the petitioners to the status of single persons in the State of Nevada, your petitioners intermarried with each other in the State of Nevada and in accordance with the laws of the State of Nevada and subsequently thereto came to the State of North Carolina where they were indicted for bigamous cohabitation. Your petitioners relied upon Article 4, Section I of the Constitution of the United States requiring that such full faith and credit be given in the State of North Carolina to the decrees of the courts of the State of Nevada as are given to those decrees in the State of Nevada;

Your petitioners relied upon Article 4, Section II of the Constitution of the United States which requires that they be accorded the same privileges and immunities in every State of the Union as they were accorded in the State of Nevada which provision is as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Your petitioners also relied upon the proposition that it was and is an unconstitutional extension of legislative power to extend to the State of Nevada the marriage and divorce laws of the State of North Carolina and by judicial interpretation of the North Carolina legislative enactments dictate what should be valid and invalid in the State of Nevada.

Amendment 14 of the Constitution of the United States provides among other things as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Your petitioners further relied upon the proposition that a divorce action is one *in rem* or *quasi in rem* affecting only the status of the parties involved and they, therefore, contend that substituted service is not only authorized by the laws of the State of Nevada but is also authorized by the laws of the State of North Carolina, Section 491 of the North Carolina Code being as follows:

> "When the place of residence is known and the same is made to appear by affidavit, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the papers shall, in making his return, use a form of certificate substantially as follows:"

The trial judge charged the jury as a matter of law that the Nevada divorce decrees and the marriage of your petitioners all consummated in the State of Nevada were void as a matter of law under the laws of the State of North Carolina irrespective of the provisions of the Constitution of the United States (R. 42, 43);

The Supreme Court of North Carolina held that the Courts of North Carolina are under no obligation by virtue of Article 4, Section I of the Constitution of the United States to give full faith and credit to the decrees of sister States (R. 70).

Jurisdiction.

This Court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves three distinct federal questions, as follows:

1.

The Supreme Court of North Carolina is obliged to give full faith and credit to the decrees of a sister State when those decrees have been entered into pursuant to and in accordance with the laws of such sister States;

2.

The petitioners having been adjudged *bona fide* citizens and residents of the State of Nevada and having married in said State pursuant to its laws they were entitled to the benefits conferred by Article 4, Section II of the Constitution of the United States;

3.

The petitioners having been legally divorced pursuant to the laws of the State of their domicile and having intermarried with each other pursuant to the laws of the State of their domicile could not by virtue of the provisions of Amendment 14 of the Constitution of the United States be convicted for bigamy or bigamous cohabitation upon moving into some other State.

The foregoing propositions were presented to the Supreme Court of North Carolina by your petitioners' briefs but the Supreme Court of North Carolina held that it was

not bound by the full faith and credit clause of the Constitution of the United States and failed to pass upon the other constitutional questions. It is not open to your petitioners to file a petition to rehear in that court (see clerk's certificate, R. 76).

Insofar as your petitioners have been able to ascertain the Supreme Court of the United States has never passed upon the constitutional questions involved in this matter where parties were prosecuted for bigamy or bigamous cohabitation.

WHEREFORE, it is respectfully prayed that this petition for a writ of certiorari be allowed and that the writ be granted to review the judgment and opinion of the Supreme Court of North Carolina; and your petitioners will ever pray.

W. H. STRICKLAND,
Lenoir, North Carolina,
HARRY F. GILLIS,
Washington, D. C.,
Attorneys for Petitioners, O. B. Williams and Lillie Shaver Hendrix.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Supreme Court of North Carolina sought to be reviewed is reported 220 North Carolina, page 445, and appears in the record filed herein beginning on page 55 and continuing through page 76 inclusive.

Jurisdiction.

The petitioners contend first that under the full faith and credit clause, Article 4, Section I of the Constitution of the United States, that they are entitled to have the opinion of the Supreme Court of North Carolina reviewed, said opinion declaring that it is not bound by the properly exemplified judicial decrees of a sister State.

In *Davis* v. *Davis*, 305 U. S. 32, 83 L. Ed. 26, a recent case, the Supreme Court of the United States held:

> "28 U. S. C. A., Sec. 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken. Thus Congress rightly interpreted the clause to mean not some but full credit—the act extended the rule of the Constitution of all courts, Federal as well as State."

Likewise in *Loughran* v. *Loughran*, 292 U. S. 216, 78 L. Ed. 1219, it is held:

> "Marriages not polygamous or incestuous or otherwise declared void by statute will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction."

> "Courts of the District of Columbia are bound, equally with the courts of the states, to observe the command of the full faith and credit clause."

"If a marriage is valid in the state in which it is contracted its validity will be recognized in another state so as to entitle the woman to dower in the lands in the latter state although the marriage would not have been valid as contracted in such state."

In *Atherton* v. *Atherton*, 181 U. S. 155, this Court held:

"A decree of divorce based upon notice pursuant to state laws is entitled to faith and credit in the courts of another State."

In *Janssen* v. *Janssen*, 269 Ill. App. 233, it was held where a party to divorce proceedings in a sister State has brought suit upon constructive service and established a *bona fide* residence in such State and the suit is free from any fraud, the courts of Illinois will give full faith and credit to the decree of such other State.

In *Miller* v. *Miller*, 200 Iowa 1193, foreign divorce decrees are held to be entitled to full faith and credit.

In *McKisson* v. *McKisson*, 154 Sou. 618, the Louisiana courts held that the courts of one State cannot ignore divorce decrees rendered in another State.

In *Palmer* v. *Palmer*, 265 Mass. 242, it was held that non residents of the State who married outside of the State though violative of the restrictions of the State of the forum were entitled to have such marriages recognized in the State of the forum.

In *Hanna* v. *Hanna*, 224 Mo. App. 1142 (32 S. W. 2d. 125) it was held that a divorce decree rendered in another State and not proven to have been obtained by fraud or collusion is entitled to recognition.

Pahy v. *Pahy*, 107 N. J. Eq. 538 (153 Atlantic 519) it was held that where the court rendered the decree of divorce if it had jurisdiction of the subject matter its adjudication that the complainant or plaintiff in the divorce action was

a *bona fide* resident was conclusive and final and binding upon all the courts.

The case of *Haddock* v. *Haddock*, 201 U. S. 562, 50 L. Ed. 867, is distinguishable from the case at bar for the reason that the matter there involved was a right *in personam* which the foreign court had attempted to adjudicate under constructive service. The petitioners in the instant case were adjudged by the courts of Nevada to be *bona fide* residents of that State. There is absolutely no evidence in the record or offered by the State to show fraud upon the court of Nevada in the procurement of such a judgment. In consequence of that judgment and while citizens and residents of Nevada, your petitioners procured decrees of absolute divorce in full compliance with the laws of Nevada. Subsequent to said decrees and while your petitioners were still *bona fide* residents of the State of Nevada, your petitioners were intermarried with each other. Some time later they came to the State of North Carolina, and the record is devoid of any evidence that they intended to change their legal domicile from the State of Nevada to North Carolina.

Therefore, the petitioners contend that under Article 4, Section II of the Constitution of the United States that they were entitled to the privileges and immunities therein guaranteed to them.

In *Conner* v. *Elliott*, 18 How. 591, 15 L. Ed. 497, the court held the privileges secured by this clause are those which belong to citizenship.

In this case it is to be observed that there is no statute prohibiting the establishment of residence in Nevada and the procurement of divorce in Nevada and marriage in Nevada. These acts were perfectly legal in the State of Nevada and not prohibited by any North Carolina statute.

In *Cole* v. *Cunningham*, 33 Fed. 538, it was held:

> "The intention of this clause was to confer on the citizens of the service of a general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions."

Amendment 14 of the Constitution of the United States provides among other things, as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

The fact that the petitioners were citizens of the United States cannot be successfully disputed. Being citizens of the United States they had the right to migrate from one State to another. There is no Federal statute prohibiting the migration of people from North Carolina to Nevada or any other State. There is no Federal statute prohibiting people who have met the residence requirements of the State of Nevada from instituting divorce actions in said State.

There being no prohibition against such acts they, therefore, constitute privileges to all of the citizens of all of the States and when the Supreme Court of North Carolina in its opinion stated that the Nevada decrees in this instance were null and void for lack of a compliance with the North Carolina Statutes in obtaining a divorce, they by that opinion enforced a law applicable only to the State of North Carolina, in the State of Nevada and that said opinion is in violation of the fourteenth Amendment of the Constitution of the United States.

Butchers Benev. Ass'n. v. *Crescent City, L. S. L. and S. H. Co.*, 16 Wall. 36, 21 L. Ed. 394, it is held that privileges and immunities of the citizens of the United States are those which are placed by the above clause under the pro-

tection of the Federal Constitution. In *Virginia* v. *Rives*, 24 L. Ed. 667, it is held that the section applies to State action exclusively.

Divorce Action is an Action In Rem.

It is the contention of the petitioners that an action for divorce is one *in rem* or at least *quasi in rem* affecting only the status of the parties and does not operate in any sense as an action *in personam*, and that, therefore, substituted service is a recognized mode of service in all of the States of the Union which grant divorces, North Carolina included.

Cases which hold that a divorce action is one *in rem* are as follows:

Ditson v. *Ditson*, 4 R. I. 87, *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689, *Miller* v. *Miller*, 200 Iowa, 1193, *Freet* v. *Holdorf*, 205 Iowa, 1081, *Hood* v. *Hood*, 93 Mass. 196, *Kendrick* v. *Kendrick*, 188 Mass. 550, *Coffey* v. *Coffey*, 71 S. W. (2d) 141, *Keenan* v. *Keenan*, 40 Nev. 351.

If a Divorce Action is One In Rem Service by Publication is Valid.

As affecting the marital status of persons divorced upon substituted service, it appears that the courts practically unanimously hold that a divorce action is one *in rem* or *quasi in rem*. If it be either *in rem* or *quasi in rem*, then under the case of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565, substituted service is valid and the Supreme Court of North Carolina was obliged under the full faith and credit clause and the privileges and immunities clause and the Fourteenth Amendment of the Constitution of the United States to recognize the validity of the Nevada decrees granted your petitioners and to recognize the Nevada marriage entered into between your petitioners while they were *bona fide* citizens and residents of that State.

Conclusion.

Symmetrically and logically stated the proposition is this:

The petitioners in good faith established their residence in Nevada in accordance with the laws of Nevada and, in good faith and notice to their former spouses, obtained decrees of divorce. They, in good faith, intermarried in the State of Nevada believing at all times that they had met the requirements of the law.

Can the State of North Carolina successfully prosecute the petitioners who have legally divorced and legally married in a sister State in spite of the safeguards guaranteed citizens of the United States by the Constitution of the United States?

Respectfully submitted,

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